

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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Order Instituting Rulemaking to Examine  
the Commission's Energy Efficiency  
Risk/Reward Incentive Mechanism.

Rulemaking 09-01-019  
(Filed January 29, 2009)

**PRE-HEARING CONFERENCE STATEMENT OF THE  
OFFICE OF RATEPAYER ADVOCATES AND THE UTILITY REFORM NETWORK**

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## **I. INTRODUCTION**

On November 18, 2015, the Assigned Administrative Law Judge (ALJ) issued an Administrative Law Judge’s Ruling Setting Prehearing Conference (PHC) “to develop a procedural plan and schedule for resolving issues”<sup>1</sup> in compliance with Decision (D.) 15-09-026.<sup>2</sup> Decision 15-09-026 granted rehearing of D. 08-12-059, D. 09-12-045 and D.10-12-049, and directed the consolidated rehearing of those decisions in this docket. The Ruling directed parties to “come prepared at the PHC to offer proposals as to a schedule, and procedural steps for resolving all rehearing issues as identified in D.15-09-026” and encouraged parties to file statements in advance of the PHC.<sup>3</sup>

The Office of Ratepayer Advocates (ORA) and The Utility Reform Network (TURN) submit this joint prehearing conference statement.<sup>4</sup> As explained below, ORA and TURN recommend that the Commission direct parties to submit proposals recommending risk/reward incentive (RRIM) awards or penalties that are based on the existing record and that comply with the requirements of the RRIM, including the foremost principle that the Commission’s Energy Division verify all energy efficiency savings that form the basis of the final incentive awards.<sup>5</sup> The proposals should include a process for refunding any overpayments to ratepayers.

## **II. BACKGROUND**

Decision 15-09-026 granted the joint applications for rehearing of three decisions challenged by TURN and/or ORA: D.08-12-059, D.09-12-045, D.10-12-049.<sup>6</sup> Each of the three decisions awarded money to Pacific Gas and Electric Company (PGE), Southern California Edison Company (SCE), Southern California Gas Company (SoCalGas) and San Diego Gas & Electric Company (SDG&E)<sup>7</sup> for the Utilities’ performance in administering energy efficiency

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<sup>1</sup> Administrative Law Judge’s Ruling Setting Prehearing Conference, November 18, 2015 (Ruling), p. 1.

<sup>2</sup> D.15-09-026, Ordering Paragraph 8, p. 13.

<sup>3</sup> Ruling. p. 3.

<sup>4</sup> Ruling. p. 3.

<sup>5</sup> D.07-09-043, Conclusion of Law 5(e), p. 216

<sup>6</sup> D.15-09-026, Ordering Paragraphs 4 and 5 at p. 13.

<sup>7</sup> ORA and TURN’s PHC Statement refers collectively to PG&E, SCE, SoCalGas, SDG&E, and as the Utilities.

programs between 2006-2008. The money was awarded pursuant to the shareholder RRIM then in effect, but as D.15-09-026 recognized, the three decisions failed to comply with the RRIM.

The Commission adopted the RRIM in recognition of the importance of energy efficiency as a resource for meeting California's energy needs. The RRIM's premise was straightforward: the Utilities would design and implement energy efficiency programs to reduce the demand and consumption of energy, and shareholders and ratepayers would share the benefits that exceeded the Commission's adopted saving thresholds. The Utilities would design energy efficiency programs using forecasted (*ex ante*)<sup>8</sup> data for the number of measures installed, and the expected savings and demand reductions, but the award of incentives would rely on the Energy Division's independent verification (*ex post*) of actual installations and savings. Relying on *ex post* measurements would ensure that ratepayers paid incentives to shareholders for real savings, rather than forecasted savings that did not materialize.<sup>9</sup>

Decision 07-09-043 found that an effective incentive mechanism should include the possibility of receiving incentives during the three-year energy efficiency program cycle. To provide timely feedback to the Utilities for their performance in achieving energy efficiency savings, and to "produce a stream of earnings during and at the end of the program to provide ongoing incentives to the [U]tilities," the RRIM included two interim incentive payouts as well as one final true-up claim tied to the Energy Division's final verification of energy savings.<sup>10</sup>

Decision 07-09-043 provided that the interim incentive payments would be calculated using *ex ante* forecasts of demand reduction and energy impacts parameters, but verified (or *ex*

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<sup>8</sup> The tension between the use of *ex ante* and *ex post* measurements was at the heart of nearly all RRIM disputes. *Ex ante* means parameters (including number of energy efficiency measures installed, amount of savings achieved per measure, and the amount of demand reduction achieved per measure) as predicted at the outset of the program. *Ex post* applies to those same parameters as measured and verified after the completion of the program. Thus, *ex ante* and *ex post* numbers will likely differ, just as any real world forecast is likely to differ from the actual event. Using *ex post* numbers in the RRIM as originally designed was an important ratepayer protection that would decrease the temptation for the Utilities to use inflated savings estimates in order to obtain higher incentives. D.07-09-043, Findings of Fact 109 and 111, p. 204. Using *ex post* numbers for energy efficiency savings is also more reliable for procurement planning.

<sup>2</sup> D.07-09-043, Conclusion of Law 5(e), p. 216 ("All calculations of the net benefits and kW [kilowatt], kWh [kilowatt hour] and therm achievements are independently verified by the Commission's Energy Division and its evaluation, measurement and verification (EM&V) contractors, based on adopted EM&V protocols.").

<sup>10</sup> D.07-09-043, p. 124.

*post*) measurements of the number of energy efficiency measures installed and their costs.<sup>11</sup> The two interim payments would be adjusted or “true-up” after Energy Division’s *ex post* evaluation determined *actual* demand reduction and energy savings consistent with established evaluation, measurement and verification (EM&V) protocols.<sup>12</sup>

Decision 08-12-059 and D.09-12-045 thus awarded interim payments, and D.10-12-049 awarded a final round of payments, but as D.15-09-026 recognized, there was no actual “true-up” of the interim awards based on the Energy Division’s final verified evaluation results.<sup>13</sup> TURN and ORA challenged the awards,<sup>14</sup> and D.15-09-026 agreed that “there is merit to the arguments presented,”<sup>15</sup> granted the applications for rehearing of the three decisions awarding incentives, and ordered rehearing of the three challenged decisions to ensure that incentives awarded by those decisions are “just and reasonable and based on calculations verified by the Commission, via its Energy Division, pursuant to the directives and process adopted in Rulemaking 06-04-010 and Rulemaking 09-10-019 as modified.”<sup>16</sup> To the extent that the rehearing process determines that the three challenged decisions awarded incentives that fail to

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<sup>11</sup> D.07-09-043, pp. 114-15; 116 (Energy Division staff verify utility reported information regarding number of installations and their costs as part of the interim verification process, but “per-measure savings for interim claim are still based on expected or estimated (*ex ante*) savings for each of the interim claims.”)

<sup>12</sup> D.07-09-043, p. 116 (“For the final ‘true-up’ claim, the achievements considered at that time reflect the results of the Final Verification and Performance Basis Report, that is, the *ex post* results of all performance parameters evaluated by Energy Division and its consultants for the program cycle;” p. 119; “it is not until the final true-up claim that we will be able to determine the level of net benefits (PEB) and MW, GWh and MTherm savings produced by the energy efficiency portfolio over the three-year period, based on all the EM&V activities undertaken for that program cycle;” Ordering Paragraph 4, p. 221.

<sup>13</sup> D.15-09-026, p. 7.

<sup>14</sup> D.15-09-026, p. 2 (“TURN and ORA allege the awards authorized by the challenged decisions are not based on the evaluation, measurement and verification (EM&V) review procedure (performed for the Commission by our Energy Division), and contend they are unreasonable and unjustified, as well as arbitrary and capricious, and violate Public Utilities Code sections 451 and 1705. TURN and ORA also allege that none of the three awards decisions for the 2006-2008 program cycle are supported by substantial evidence and, in addition to section 451, that the final decision D.10-12-049, also violates sections 381(b)(1), 454.5(b)(9)(C), and 890, resulting in rates that are neither just nor reasonable, and constitutes an abuse of discretion.”(footnotes omitted)).

<sup>15</sup> D.15-09-026, p. 3.

<sup>16</sup> D.15-09-026, Ordering Paragraph 6 at p. 13.

meet this standard, the rehearing proceeding shall also consider whether “refunds ... of awards based on unverified claims are due and, if so, how such refunds... shall be conducted.”<sup>17</sup>

### **III. DISCUSSION**

The Ruling requested that parties address the following seven questions or issues:

1. Is the record in Rulemaking (R.) 06-04-010 and R.09-01-019 pertaining to D.08-12-059, D.09-12-045 and D.10-12-049, sufficient to resolve all rehearing issues identified in D.15-09-026 or is further record development necessary?
2. To the extent, if any, that a party believes the existing record is not complete as a basis to resolve all rehearing issues, identify specifically what new record evidence and/or procedural processes are needed to complete the record. What material facts are disputed? What questions of law are disputed? Identify specifically what procedural forum(s) (e.g., written comments, evidentiary hearings, etc.) are required or appropriate in order to complete the record.
3. What material facts can be stipulated at this time?
4. If no further record development is necessary, what procedural process is appropriate preceding issuance of a proposed decision resolving all of the rehearing issues?
5. Since the rehearing issues involve three separate decisions that are interrelated, is it appropriate to resolve issues related to the total incentive payment to the utilities, without expressly distinguishing the awards from each of the individual decisions? Please address any challenges with this approach. To the extent a party believes it is necessary to address each of these decisions separately, what is the best procedural approach to do so?
6. Parties are encouraged to pursue settlement or alternative dispute resolution as a means of resolving any disputed issues in this proceeding. Parties may consider the possibility of such resolution in developing their PHC statements and schedule proposals.
7. Besides scope and schedule, are there any additional procedural issues that should be addressed during the PHC?<sup>18</sup>

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<sup>17</sup> D.15-09-026, Ordering Paragraph 6 at p. 13.

<sup>18</sup> Ruling, pp. 3-4.

ORA and TURN provide comments on these topics below:

**A. The Underlying Record in R.06-04-010 and R.09-01-019 Is Extensive and Provides a Sufficient Factual Basis for Resolving the Rehearing Issues Identified in D.15-09-026.**

The Commission's record in R.06-04-010 and R.09-01-019 is extensive, including 779 filed documents in R.06-04-010 and 308 filed documents in R.09-01-019. Decision 15-09-026 requires the Commission to ensure that incentives awarded to the Utilities are just and reasonable and based on calculations verified by the Commission, via its Energy Division, pursuant to the directives and process adopted in Rulemaking 06-04-010 and Rulemaking 09-10-019 as modified.<sup>19</sup> The Energy Division evaluated the Utilities 2006-2008 energy efficiency savings, issuing the First Verification report on February 5, 2009;<sup>20</sup> the Second Verification Report in Resolution E-4272 on October 15, 2009;<sup>21</sup> and the Final 2006-2008 Energy Efficiency Evaluation Report on July 26, 2010.<sup>22</sup> The Final 2006-2008 Energy Efficiency Evaluation Report described the verified energy savings, but did not evaluate the possible award of incentives.

Instead, the Energy Division's 2006-2008 Scenario Analysis Report (Scenario Report), which was entered into the record by Assigned Commissioner Ruling,<sup>23</sup> provides the calculated earnings for a range of scenarios. Most of those scenarios violate the RRIM's requirement that the Energy Division independently verify energy efficiency savings.<sup>24</sup> Scenario 7 presents the

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<sup>19</sup> D.15-09-026, Ordering Paragraph 6, at p. 13.

<sup>20</sup> D. 15-09-026, p. 12 ("[T]his order denies ORA's request for official notice of the draft and final EM&V reports for the first interim period. Those reports are already part of the official record and since ORA made its request, the Commission adopted Resolution E-4272.")

[http://www.cpuc.ca.gov/PUC/energy/Energy+Efficiency/EM+and+V/081117\\_Verification+Report.htm](http://www.cpuc.ca.gov/PUC/energy/Energy+Efficiency/EM+and+V/081117_Verification+Report.htm)

<sup>21</sup> [http://docs.cpuc.ca.gov/PUBLISHED/FINAL\\_RESOLUTION/108628.htm](http://docs.cpuc.ca.gov/PUBLISHED/FINAL_RESOLUTION/108628.htm)

<sup>22</sup> Filed in R.09-01-019 by Energy Division on July 26, 2010 pursuant to the ALJ's Ruling dated July 21, 2010.

<sup>23</sup> Assigned Commissioner Ruling Providing Energy Report and Soliciting Comments on Scenario Runs, May 4, 2010.

<sup>24</sup> D.07-09-043, Conclusion of Law 5(e), p. 216 ("All calculations of the net benefits and kW [kilowatt], kWh [kilowatt hour] and therm achievements are independently verified by the Commission's Energy Division and its evaluation, measurement and verification (EM&V) contractors, based on adopted EM&V protocols."); Scenario Report, p. 1 ("The scenarios presented as alternatives to Scenario 7 are provided as information only and are not endorsed by Energy Division as appropriate for determining shareholder earnings.")

Utilities' achievements "based on net evaluated savings" as the RRIM requires.<sup>25</sup> These reports, attachments, supporting analyses and documentation, along with the opportunity for parties to propose RRIM awards or penalties consistent with the RRIM, constitute a sufficient basis for the Commission to adopt a decision that ensures that RRIM awards are just and reasonable and comply with the requirements of the RRIM.

**B. The Commission Adopted an Earnings Mechanism that Balances Risk and Reward, and was Intended to Reward Real Energy Efficiency Savings Verified by the Commission's Energy Division Acting as the Independent Evaluator to Measure Actual Program Impacts.**

The following material facts should be stipulated at this time:

1. The Commission adopted an energy efficiency shareholder earnings mechanism that was intended to balance risk and reward for utility shareholders in order to encourage optimal effort by the utility program administrators to maximize energy savings.<sup>26</sup>
2. The Commission designed the energy efficiency shareholder earnings mechanism so that ratepayers only pay earnings for real and verified savings and benefits.<sup>27</sup>
3. The Commission Energy Division staff was given the responsibility of determining the actual energy savings that would be the basis for the energy efficiency shareholder earnings calculation.<sup>28</sup>

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<sup>25</sup> Scenario Report, p. 1.

<sup>26</sup> D.07-09-043, Conclusion of Law 5, pp. 215-216.

<sup>27</sup> D.07-09-043, Conclusion of Law 5(e), p. 216 ("All calculations of the net benefits and kW, kWh and therm achievements are independently verified by the Commission's Energy Division and its evaluation, measurement and verification (EM&V) contractors, based on adopted EM&V protocols.")

<sup>28</sup> See e.g. D.05-01-055, p. 12, p. 115, Ordering Paragraph 4, p. 155; D.07-09-043, Conclusion of Law 5(e), p. 216 ("All calculations of the net benefits and kW [kilowatt], kWh [kilowatt hour] and therm achievements are independently verified by the Commission's Energy Division and its evaluation, measurement and verification (EM&V) contractors, based on adopted EM&V protocols."); D.09-12-045, p. 36.

4. The Utilities have been aware that RRIM awards would be based on ex post evaluation, i.e. actual program impacts since as early as 2005.<sup>29</sup>

**C. The Commission should Direct Parties to Submit Proposals that Quantify the 2006-2008 RRIM Awards or Penalties Based on the Existing Record and that Comply with the Requirement that the Energy Division Verify All Savings.**

To resolve the errors committed by D.08-12-059, D.09-12-045, and D.10-12-049, and to adopt RRIM awards that are just and reasonable, the Commission should direct parties to file proposals that enumerate the earnings or penalties that should have been adopted for the 2006-2008 energy efficiency program cycle had the Commission implemented the RRIM adopted by D.07-09-043 and amended by D.08-01-042. Parties' proposals should be based on the existing record, including the First and Second Interim Verification Reports, the Final 2006-2008 Energy Efficiency Evaluation Report, and the 2006-2008 Scenario Analysis Report. Parties' filings should include proposals detailing how any RRIM awards that did not adhere to the requirements adopted by D.07-09-043 and amended by D.08-01-042 should be refunded to ratepayers.

Parties should have the opportunity to file opening and reply comments on other parties' proposals. With the completion of reply comments the Commission should issue a proposed decision that trues-up the 2006-2008 earnings consistent with the incentive mechanism adopted by D.07-09-043 and amended by D.08-01-042, and closes the proceeding.

**D. The Commission Should Issue a Single Decision Resolving Issues Related to the Total Incentive Payment.**

The earnings awarded by D.08-12-059, D.09-12-045, and D.10-12-049 constitute two interim awards and one final true-up award for program performance over the single three-year (2006-2008) program cycle. The earnings awarded in D.10-12-049 were incremental to the earnings awarded in D.09-12-045, which were in turn incremental to the earnings awarded in

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<sup>29</sup> D.07-09-043, Finding of Fact 158, p. 212 ("The utilities have been put on notice well before the 2006-2008 program cycle began that [performance earnings basis] PEB parameters associated with load impacts, particularly [net-to-gross] NTG ratios, would be trued-up based on ex post studies in each program cycle. Assertions that a true-up of these parameters in the final earnings claim represents unforeseen evaluation risk are therefore without merit."); October 5, 2007 Assigned Commissioner Ruling in R.06-04-010, summarizing Case Management Statement filed on July 18, 2005, in which PG&E responded to criticisms about the use of unrealistic *ex ante* planning assumptions that it would 'adjust its 2006 portfolio lighting savings to reflect more realistic and updated assumptions on [net-to-gross]NTG ratios.'"



D.08-12-059. Each of these Decisions was based on the facts known at the time. The most efficient way for the Commission to resolve the rehearing issues, and true-up the earnings, is to adopt the corrected earnings award for the full program cycle in a single final Decision. Although D.15-09-026 identified errors in each of the Decisions, such as payment of D.08-12-059's payment of \$82 million in RRIM based on the Utilities' self-reported savings,<sup>30</sup>, and D.09-12-045's use of "unmodified *ex ante* assumptions" (i.e, not independently verified savings) to award incentives, correcting each improper interim award many years later is less important than rectifying the final awards as promptly as possible. ORA and TURN therefore recommend that the Commission encourage parties to submit final proposals that resolve all errors, and to then issue a single final decision for the 2006-2008 energy efficiency program.

This adopted earnings award would be used to true-up the earnings previously authorized by D.08-12-059, D.09-12-045, and D.10-12-049. The final Decision would also adopt a process for handling any refunds that are warranted by the final true-up calculation.

ORA and TURN propose the following schedule:

PHC	December 11, 2015
Parties file proposals for RRIM awards that comply with RRIM requirements	January 25, 2016
Opening comments on party proposals	February 25, 2016
Reply comments on party proposals	March 25, 2016
Proposed Decision	May, 2016
Final Decision	June, 2016

#### IV. CONCLUSION

ORA and TURN look forward to participating in a process that ensures that ratepayers receive the benefits of the RRIM as originally designed by the Commission.

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<sup>30</sup> D.15-09-026, p. 5.

Respectfully submitted,

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